IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7704 OF 2006

Ramchandra M. Ghodekar and ors. ...Petitioners

v/s

Sou Manda Balu Bhaskar and ors. ...Respondents

Mr G.S. Godbole for Petitioners.

Mr S.A. Sawant for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 6TH JULY 2007.

P.C. :-

1. Rule, returnable forthwith. Heard finally by consent of parties.

2. The facts that are material and relevant for deciding this petition are that the respondent No.1 - Manda filed R.C.S. No.78 of 2006 seeking partition and separate possession of her share in the property. The suit property has been described in Part I of the plaint. The present petition relates to three lands bearing survey Nos.12/1A, 127/2 and 127/5 of Village Ghodegaon, Taluka Ambegaon, District Pune, which is described in Part I. The plaintiff claims that the suit property including the abovesaid three lands were owned by her father Mahipati and she is entitled to 1/5th share in the property. In the plaint, it is her case that survey Nos.127/2 and 127/8 have come to the father because of gift deed. In the civil suit, she has applied for an order of temporary injunction restraining the defendants from transferring or alienating the entire suit property during the pendency of the suit. The present petitioners who are defendants in the suit filed their reply. In the reply, they pointed out that the aforesaid three lands were not owned by Mahipati but

were owned by his uncle Mhatarba and that the said Mhatarba had no issue and that Mhatarba had executed a registered gift deed of that property dated 3rd March 1952 in favour of the present petitioners, who are defendant Nos.1 and 2 and therefore, these three properties are their separate properties and they have not inherit them from their father - Mahipati. The Trial Court decided the application by order dated 5th July 2006. The Trial Court granted the injunction but without considering the case of the present petitioners that the aforesaid three lands are not the property owned by Mahipati in which the plaintiff can have a share. The present petitioners therefore filed appeal before the learned District Judge. The learned District Judge dismissed the appeal. The learned District Judge referred to the gift deed on which the petitioners rely, but the leaned District Judge held that the gift deed was not acted upon. It is the order of the Trial Court granting temporary injunction and the order of the appeal court dismissing the appeal which are challenged in the present petition. I have heard learned counsel for both the sides. The Trial Court has not at all considered the defence of the petitioners in relation to the above referred lands. The Appeal Court has referred to the defence in paragraph 11 of its order. Paragraph 11 of the order reads as under :-

"11. The said document further reveals that the deceased Mahipati - father of present Plaintiff Manda and the defendant Nos.1 and 2 were nephews of Mhatarba and the mother of donees was shown as their guardian at that time. If we consider this aspect of the matter, coupled with the extract of mutation entry No.6604 and another extract of mutation entry No.766, then it appears that the gift deed was not at all acted upon. It appears that the lands mentioned in the gift deed were in joint possession of the deceased Mahipati and his sons till the death of Mahipati and thereafter it continued to be joint between the parties to the suit. The respondent No.1 / Plaintiff is admittedly the real sister of Defendant Nos.1 and 2. It is not disputed that the father of Plaintiff and Defendant Nos.1 and 2 died in the year 1996. Considering all these aspects together, I think that the Plaintiff has certainly right and interest in the suit properties. Therefore, I find it very difficult to accept the submissions made by Shri Barve, Advocate in this behalf."

. The learned District Judge has recorded a

finding that the gift deed was not acted upon and therefore, the lands of Mhatarba will be inherited by Mahipati and therefore, the plaintiff will have a share in those lands. The finding recorded by the learned District Judge appears to be contrary to the case of the plaintiff. Perusal of paragraph 3 of the plaint shows that the plaintiff herself stated that so far as the aforesaid lands are concerned, they came by way of gift deed to Mahipati, her father. There is no other gift deed than the one on which the petitioners rely on produced. Therefore, it is clear that even according to the plaintiff, the gift deed has been acted upon and the perusal of that gift deed shows that by that gift deed, the lands were not given to Mahipati. What is further to be noted is that even in the revenue record, entries were taken pursuant to the gift deed and in the revenue record, the lands were shown as owned by the petitioners because of the gift deed and not by inheritance. It thus becomes clear that the finding recorded by the learned District Judge that the gift deed was not acted upon suffers from non-application of mind and therefore the order is liable to be set aside. In the result therefore, petition succeeds and it is allowed. It is directed that the order of the temporary injunction granted by the Trial Court shall not operate in relation to survey Nos.126/1A, 127/2 and 127/5 of Village Ghodegaon, Taluka Ambegaon, District Pune. Rule is made

absolute accordingly with no order as to costs.

. Parties to act on the copy of this order duly authenticated by the Sheristedar / Private Secretary as true copy.

. Certified copy expedited.